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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 197

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
Appellant,

vs.

V. RIVERA S. EN C.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EBERHARD P. DEUTSCH,
Counsel for Appellee.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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SUPREME COURT OF LOUISIANA

No. 38,345

V. RIVERA S. EN C.,

vs. *Appellee,*

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL.,

Appellant,

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

MOTION OF APPELLEE TO DISMISS OR AFFIRM AND STATEMENT OF GROUNDS MAKING AGAINST JURISDICTION.

Comes now the appellee, V. Rivera S. en C., by Messrs. Deutsch, Kerrigan & Stiles, its counsel, and files herewith its motion to dismiss or, in the alternative, to affirm, the appeal, and its statement of grounds making against the jurisdiction of the Supreme Court of the United States of this cause, pursuant to the provisions of Rules 7 and 12 of said Court.

A

Motion to Dismiss or Affirm

Appellee moves the Supreme Court of the United States to dismiss or, in the alternative, to affirm with costs, the appeal taken herein to said Court by appellant, Texas and New Orleans Railroad Company, on the ground that no

appeal lies on the second error assigned by appellant, and that appellee, while satisfied with the validity thereof, has waived the nominal penalties forming the basis of the first and only other error assigned by appellant, and has entered a remittitur with regard thereto in the state court, as hereinafter explained. Appellee submits, in support of said motion, the following

B

Statement of Grounds Making Against Jurisdiction

Only two errors are assigned by appellant. The first deals with a nominal penalty allowed by the state court under an applicable state statute and subsequently waived and remitted by appellee. The second, and only remaining, assignment of error, deals with the finding of the state court, asserted by appellant to raise a federal question, that appellant railroad was a carrier and insurer rather than a mere warehouseman *quoad* certain shipments, "under circumstances and facts such as were presented in this case."[1]

Appellee submits that the second assignment of error presents the only remaining ground of appellant's appeal; that this second assignment does not present a legal ground of appeal; and that the first assignment, involving nominal penalties as to which appellee has since entered a remittitur, was merely the means by which appellant sought to bring before the Supreme Court of the United States, an appeal on its second assignment, which it could not otherwise present to that Court.

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[1] Assignments of Error, 2.

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I

There Is No Appealable Nor Even Substantial Federal Question under Second Assignment

This assignment, on its face, presents no ground of appeal under section 237 (a) of the Judicial Code, since it does not draw in question the validity of any statute or treaty. As stated by appellant itself, this assignment merely presents a "federal question" as to whether the relationship of appellant to certain shipments "was that of a common carrier and not of a warehouseman . . . under circumstances and facts such as were presented in this case."[2]

It may be that appellant might legally have applied to the Supreme Court of the United States for certiorari on this point under section 237 (b) of the Judicial Code; and that, under section 237 (c), the lodging and allowance of an appeal would not alone be ground for dismissal. But even treating this assignment as an application for certiorari, it is apparent that it involves primarily matters of fact and no federal question of substance.

This is apparent from the assignment of error itself, already quoted above. It is equally apparent from the petition for appeal, in which appellant frankly avers[3] that the case draws "in question the interpretation of certain provisions in the conditions of the bills of lading to the effect that under the circumstances of this case," and "as applied to the facts of this case," appellant's "relationship to the shipments in question (was) that of a common carrier and not that of a warehouseman."

The opinion of the Supreme Court of Louisiana too, bases determination of the question on application of "the contractual provisions in the bill of lading . . . to the facts

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[2] *Ibid.*

[3] Petition, Article IV.

and circumstances of the case." To illustrate this point briefly, the attention of the Court is directed to appellee's contention in the state court, that, as a matter of fact—not of law—the shipments were stored by the railroad in the depot in which they were later destroyed, "during the course of their through transit." Appellant contended in the state court that this transit had, on the contrary, been interrupted. The state court resolved this question of fact in appellee's favor, and held that the goods were destroyed in the freight depot in which they had, in fact, been stored "during the course of their through transit."[4]

It is accordingly submitted that appellant's second assignment of error is its only remaining ground of appeal, is not a legal ground of appeal, and presents no federal question of substance in any event.

II

There Is No Constitutional Question under First Assignment

The case involves three shipments of rice by rail over appellant's railroad, from Crowley, Louisiana, to New Orleans, Louisiana, thence to be forwarded by water carrier to Puerto Rico. The judgment of the state court allowed recovery against the rail carrier for loss of the shipments while still in the custody of the rail carrier in Louisiana. A penalty of $50 as to each shipment was awarded by the state court under a Louisiana statute,[5] allowing such a penalty, when judicially imposed, for failure to pay, within thirty days, a claim for loss of goods while in the carrier's possession, "in case of shipments wholly within the State."

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[4] At page 10 of its typed jurisdictional statement, appellant itself seeks to demonstrate the error of another finding of fact by the Supreme Court of Louisiana to the effect that appellant railroad had not made tender of delivery of the goods in question at New Orleans.

[5] Act 29 of 1908.

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Appellant contended, in its original pleadings in the state court of instance, that this state statute allowing this penalty is violative of the commerce clause of the Constitution of the United States. Appellant did not again urge the point, either in pleading, argument or brief, until after the state supreme court had allowed the penalty without comment as to the validity of the statute. Appellant then included this among the points made in an application to the supreme court for a rehearing, and, when that was denied, used this point as its first assignment of error, in an obvious attempt, by this means, to bring its real grievance (the second assignment), on which it has no right of appeal, before the Supreme Court of the United States.

Appellee submits that the question of the validity of the Louisiana penalty statute is foreclosed by previous decisions of the Supreme Court of the United States.[6] This question has, however, become wholly moot and academic because, in order to avoid the possibility of undue and disproportionate expense in the defense of such an appeal in Washington, in light of the purely nominal amount of the penalty involved, appellee waived the penalties after appellant filed its appeal, entered a remittitur for the amount thereof in the state court, and reiterates that waiver here.

It is submitted that the within statement of grounds making against the jurisdiction of the Supreme Court of the United States suffices to support appellee's motion to dismiss or affirm.

(Signed) Deutsch, Kerrigan & Stiles,
Counsel for V. Rivera S. en C., Appellee.

New Orleans, 27 June, 1947.

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[6] *Atlantic Coast Line R. Co.* v. *Mazursky*, 216 U. S. 122 (1910); *Missouri, K. & T. Co.* v. *Harris*, 234 U. S. 412 (1914). *Charleston & W. C. R. Co.* v. *Varnville F. Co.*, 237 U. S. 597 (1915), is clearly distinguishable.